

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal Action
)	No. 09-10017-GAO
TAREK MEHANNA,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

HEARING TRANSCRIPT

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, October 26, 2011
12:12 p.m.

Marcia G. Patrisso, RMR, CRR
Cheryl Dahlstrom, RMR, CRR
Official Court Reporters
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

1 APPEARANCES:

2 OFFICE OF THE UNITED STATES ATTORNEY
3 By: Alope Chakravarty and Jeffrey Auerhahn,
4 Assistant U.S. Attorneys
5 John Joseph Moakley Federal Courthouse
6 Suite 9200
7 Boston, Massachusetts 02210

8 - and -
9 UNITED STATES DEPARTMENT OF JUSTICE
10 By: Jeffrey D. Groharing, Trial Attorney
11 National Security Division
12 950 Pennsylvania Avenue, NW
13 Washington, D.C. 20530
14 On Behalf of the Government

15 CARNEY & BASSIL
16 By: J.W. Carney, Jr., Esq.
17 Janice Bassil, Esq.
18 John E. Oh, Esq.

19 20 Park Plaza
20 Suite 1405
21 Boston, Massachusetts 02216
22 - and -

23 LAW OFFICE OF SEJAL H. PATEL, LLC
24 By: Sejal H. Patel, Esq.
25 101 Tremont Street
Suite 800
Boston, Massachusetts 02108
On Behalf of the Defendant

1 (The following proceedings were held in open court
2 before the Honorable George A. O'Toole, Jr., United States
3 District Judge, United States District Court, District of
4 Massachusetts, at the John J. Moakley United States Courthouse,
5 One Courthouse Way, Boston, Massachusetts, on ^ Date.

6 The defendant, Tarek Mehanna, is present with counsel.
7 Assistant U.S. Attorneys Aloke Chakravarty and Jeffrey Auerhahn
8 are present, along with Jeffrey D. Groharing, Trial Attorney,
9 U.S. Department of Justice, National Security Division.)

10 THE CLERK: All rise.

11 (The Court enters the courtroom at 12:12 p.m.)

12 THE CLERK: United States District Court for the
13 District of Massachusetts.

14 Court is now in session. Please be seated.

15 For a hearing in the case of United States of America
16 versus Tarek Mehanna, 09-10017. Will counsel identify
17 yourselves for the record.

18 MR. CHAKRAVARTY: Good afternoon, your Honor. For the
19 government, Assistant U.S. Attorneys Aloke Chakravarty and
00:08 20 Jeffrey Auerhahn, and counterterrorism section attorney,
21 Jeffrey Groharing.

22 MR. AUERHAHN: Good afternoon, your Honor.

23 MR. GROHARING: Good afternoon, your Honor.

24 MR. CARNEY: Your Honor, I'm J.W. Carney, Jr. With me
25 is Janice Bassil, Sejal Patel and John Oh.

1 MS. BASSIL: Good morning, your Honor.

2 THE COURT: The main order of business is to talk
3 about what may or may not be said during the openings. We've
4 gotten new filings today that I've been trying to absorb, but
5 before we turn to that let's deal with a couple of the older
6 issues. With respect to what has been referred to as the U.K.
7 hard drives, the defendant's motion to exclude those is denied.
8 I think that there's an insufficient demonstration of
9 prejudice.

00:09 10 The next category is experts, but the field seems to
11 be changing on who is being offered. The government, as I
12 understand it, is relying not only on -- for its case-in-chief
13 only on Kohlmann. And I don't know what that does in terms of
14 the defense side without Vidino being in the case-in-chief.
15 Even the summaries are extended, not to mention Kohlmann's
16 report itself.

17 So I guess I'm not clear what you want to say about
18 some of these people. My impression is -- and this is -- by
19 the way, I'm addressing only the issue of the opening
00:10 20 statements and not the ultimate admissibility. Obviously, the
21 easiest case is something that's clearly admissible and can be
22 used. So my general disposition is if there's a substantial
23 doubt whether the objection would be sustained or not, it
24 should not be mentioned.

25 Now, with respect to the government's Kohlmann expert,

1 I understand from the government they're not going to offer any
2 expert opinion from that witness that would involve an opinion
3 about the defendant particularly. Am I right about that? That
4 is, about what the defendant knew or understood or thought or
5 whatever.

6 If that's not right, maybe you can restate what it is
7 you said you would not offer.

8 MR. CHAKRAVARTY: So in terms of what the defendant's
9 state of mind is, that's accurate, your Honor. So the idea
00:11 10 that he was a homegrown terrorist that was on some path to
11 blowing something up or committing a terrorist attack, that is
12 not going to be the scope of his testimony. The reason I
13 hesitate to adopt it wholesale is it is the theory of the case,
14 and it is intended to be elicited, that the behaviors that the
15 defendant exhibited in terms of going to Yemen and the
16 translations, all of these, that these were consistent with
17 answering the call that al Qa'ida had to him and others for the
18 types of support that they needed.

19 So it's not going to be -- I don't think the ultimate
00:12 20 question of did the defendant support al Qa'ida by doing -- was
21 that the intent of the defendant's activities, but did those
22 activities actually support al Qa'ida or were they helpful to
23 al Qa'ida I think is something that -- he's going to be
24 testifying from the lens of al Qa'ida, but the jury can easily,
25 you know, infer from that, and that's certainly the intention,

1 that they would infer that the defendant, you know, did it with
2 that purpose.

3 THE COURT: Yeah. And that's the relevant line: What
4 may be a conclusion drawn by the jury on its evaluation of all
5 the evidence is one thing, but in some circumstances, at least,
6 it would be inappropriate for an expert on either side to
7 express an opinion about that ultimate conclusion.

8 So again trying to talk about all the experts as a
9 category, I think it's appropriate for people who have studied
00:13 10 in a particular field and have the appropriate qualifications
11 to, in a sense, educate the lay jury that will not have that
12 expertise about the development of movements, even the
13 development of ideas, so long as the opinions qualify, you
14 know, under the proper rubric, which I think they probably
15 will, in large part, for those matters.

16 What you might call -- I'm not sure what you'd call
17 it. I would say general background but it may actually be more
18 in the foreground than the background, but it's not focused on
19 the defendant but it's focused on the structure of al Qa'ida;
00:14 20 for example, the principles of Islamic law and thinking,
21 there's things of that sort, I would think that there will
22 probably be experts on both sides that can address those.

23 Where it gets more doubtful is when it gets to an
24 opinion about this case and so on. And because there may be
25 some substantial *Daubert* issues, I'm just reluctant to have

1 crossed the Rubicon on this ruling. Having in mind that the
2 opening is not the same as the closing, it is simply to
3 prepare the -- so I guess without getting really into the weeds
4 of each person and every subsidiary opinion -- because many of
5 them have half a dozen or a few dozen subsidiary opinions, I'm
6 not sure it's fair to do that.

7 I mean, can you -- is what I've said so far enough
8 guidance for people or do we have to get more specific?

9 MR. CARNEY: Well, I might have missed one point, and
00:15 10 I'd ask the Court to clarify. I would view an opinion by the
11 expert that Tarek Mehanna was answering the call of what
12 al Qaeda needed to be an opinion that's excluded because it's
13 directly related to the defendant and, in fact, opining that
14 the defendant, in fact, committed the crime of material
15 support.

16 THE COURT: I think phrased that way -- and I'm not
17 sure it was a studied phrase the way Mr. Chakravarty said it --
18 I think you're right. I think the difficult question is, and
19 we have in the past used drug cases as an analogy, whether the
00:16 20 possession of certain paraphernalia is consistent with an
21 intent to distribute, and that "consistent with" question, we
22 generally permit it. So I think to the extent an expert wants
23 to give a "consistent with" opinion, they probably can.

24 It may only be a formulation difference, but to the
25 extent they say, "In my opinion he is a homegrown terrorist,"

1 then that would be out, or he is not, whichever way it goes.
2 You have people on both sides doing that.

3 So I think both with respect to -- so, I mean, is
4 that --

5 MR. CARNEY: The ruling that an expert cannot directly
6 talk about the defendant is one that we will honor in the
7 opening.

8 THE COURT: Okay.

9 MR. CARNEY: I have --

00:17 10 THE COURT: With respect to some of the defense
11 experts, there are some other issues of -- just on germaneness,
12 I think, and overgeneralization, which I'm not sure are
13 appropriate. Things like Professor Williams' testimony about
14 people trying out identities, I think that's a serious doubtful
15 admissibility, frankly. As a matter of fact, I might say
16 having just looked at the summary without any further hearing,
17 I have a doubt that Professor Williams says anything useful,
18 admissible to say. But we can cross that bridge.

19 Some of the others, though -- I think
00:18 20 Professor Johnson outlining what happened in his -- I think
21 this is a particular government objection which I do not agree
22 with. I think that his expertise about the history of Yemen is
23 admissible. But again, in the history part and not what
24 anybody particularly thought about that history.

25 The reason I think it's admissible is that whether

1 there were training camps or not may have a tendency to affect
2 a juror's assessment of whether the defendant believed it or
3 not. If it was something that did not exist, in fact, it might
4 make the jurors more reluctant to accept the fact that he
5 believed the nonexistent fact existed. So I think it's
6 admissible.

7 Anyway, with respect to one of the other major ones,
8 the doctor, I guess, Sageman, I have serious doubt about the
9 indicators and social blob theory. We don't have to resolve it
00:19 10 now. It's across the line that I draw for openings, though,
11 because I think there is enough doubt about it, enough
12 substantial question about it, that you should not get into it
13 in opening.

14 MS. BASSIL: Well, we plan to tailor his testimony to
15 what Mr. Kohlmann is allowed to testify to and what, indeed, he
16 does testify to.

17 THE COURT: Right. Right. And I think that's a fair
18 match. I don't have any problem with that. I don't think the
19 indicators -- right now I don't think the indicators of the
00:19 20 social blob theories are going to get in, but we'll address
21 that more specifically as we go on.

22 MS. BASSIL: Your Honor, as long as we're talking
23 about experts, I, frankly, would like you to ask the government
24 directly if they were ever going to call Mr. Vidino because,
25 quite frankly, I don't want to spend 20 to 30 hours preparing

1 for cross-examination of him on rebuttal if that's never going
2 to happen.

3 THE COURT: Well, I don't know -- well, I don't know
4 if you want to respond.

5 MR. CHAKRAVARTY: Yeah. The whole point of a rebuttal
6 witness is to see what the defense proffers.

7 THE COURT: Yeah, you just can't --

8 MS. BASSIL: They know what we're going to proffer.

9 THE COURT: You can't say in advance you're not going
00:20 10 to call somebody in rebuttal. So then the answer will be,
11 "Yes, we plan to," and then you'll have to do the work anyway.
12 It's not going to get you anywhere.

13 Well, so is that enough guidance for both sides on
14 experts?

15 MR. CARNEY: I think so, your Honor. At least I feel
16 I understand clearly what your Honor has said, which is if an
17 expert is going to be talking about a historical fact, about a
18 country or history --

19 THE COURT: Culture, that sort of thing in general
00:20 20 terms.

21 MR. CARNEY: Exactly. Yes, your Honor.

22 -- and stop there, then that's certainly a very bright
23 line that I will recognize.

24 MR. CHAKRAVARTY: That's clear to me, your Honor.

25 THE COURT: Okay.

1 MR. CARNEY: I did have one word I'd like to discuss
2 with your Honor. This is an unusual case because the term
3 "material support" is critical to three of the indictments.
4 What I worry about is the government, perhaps unintentionally,
5 often talks about the defendant's support for al Qa'ida, or
6 support for the ideals and goals of al Qa'ida. And in this
7 particular case it runs the risk of confusing the jury because
8 the word "support" in that context is not the equivalent of the
9 "material support" language that you're going to define.

00:21 10 And I would just ask that the government use a
11 different word than "support" because otherwise, it's going to
12 engender an objection from me so that the Court can clarify
13 "support" is not "material support," et cetera. And I think to
14 avoid the confusion, the government should not say Mr. Mehanna
15 supports it. If they want to say he agrees with the goals of
16 al Qa'ida, he agrees that there should be armed resistance
17 against American soldiers -- any other word or phrase is fine.
18 But it's that word "support" that is just going to be
19 mischievous in this trial.

00:22 20 MR. CHAKRAVARTY: Your Honor, I mean, first,
21 "support" -- you know, either construct is relevant to the
22 facts of the case. It's an English word that means the thing
23 that the government, or even the defense, will have someone
24 say.

25 Your Honor will instruct the jury on what "material

1 support" means. There are a lot of circumstances in this
2 courtroom where there is a qualifier to a word, which the jury
3 ultimately has to determine whether it meets that definition.
4 And to restrict us like that --

5 THE COURT: Yeah, I don't think it's necessary. I
6 guess all material support is support but all support is not
7 necessarily material support. But that's something the jurors
8 will sort out. I don't think it's necessary to restrict the
9 language.

00:23 10 MR. CARNEY: May I note on the record our objection to
11 your initial ruling regarding the U.K. hard drives? As we
12 predicted when we filed the motion, we have not been able to
13 study these U.K. hard drives. We have not been able to study
14 the people whose hard drives these belong to. We have not been
15 able to investigate these other cases that were involved in
16 Chechnya, in Bosnia, in England.

17 The fact that we got the equivalent of 14 hard drives
18 of material within the last month was so overwhelming to us
19 with everything else that we did that we have not been able to
00:24 20 prepare for that U.K. hard drive evidence. And your Honor will
21 expect me to object when any evidence from that is offered
22 because we have not been able to look -- or investigate the
23 material because of the late notice and the unbelievably
24 overwhelming nature of the material on those documents.

25 THE COURT: Okay.

1 MR. CARNEY: And I'm not just offering it because
2 we'll be ineffective; we just can't respond to that.

3 THE COURT: I doubt that that means ineffectiveness.

4 Anyway, I don't know if you want to respond or not or
5 just leave it as it is.

6 MR. CHAKRAVARTY: No, I don't think so, your Honor.

7 MR. GROHARING: Your Honor -- I'm sorry to interrupt,
8 your Honor. If I could just go back to the experts issue. I
9 do want to comment on some particular language that was
00:24 10 included in the defense filing last night. And particularly on
11 page 3 of their filing, the defense indicated that, and I
12 quote, "The government disingenuously represents that it
13 elected not to use Mr. Vidino in its case-in-chief," suggesting
14 that we failed to operate with an appropriate duty of candor to
15 the Court, and later it goes on to say they believe this is a
16 *Brady* violation.

17 That's completely incorrect, and I can proffer to the
18 Court that the decision not to call Mr. Vidino was made with
19 myself, Mr. Chakravarty, Mr. Auerhahn alone. Mr. Vidino was
00:25 20 not consulted. At no point has Mr. Vidino suggested that his
21 testimony is different, or would be different, than what he's
22 provided in his report that the defense has. This allegation
23 is completely baseless, and I would ask that the Court require
24 the defense to proffer what information they had to even put
25 this in a filing.

1 Unfortunately, this is not the first instance where
2 the defense has made statements like this, perhaps attempting
3 to invoke a reaction from the judge. You'll recall, your
4 Honor, a few weeks ago comments about the government
5 sandbagging, suggesting that we intentionally held back
6 discovery or dumped large volumes of discovery on them to seek
7 some kind of advantage. And your Honor will recall that that
8 was unfounded as well.

9 Our concern is that this is -- a pattern is appearing
00:26 10 here, and they're putting unsupported allegations in filings,
11 making them in the record. And we would like your Honor to
12 address that.

13 THE COURT: Well, I think your position is stated. I
14 think that's all we have to do at this stage.

15 There was also, I guess, filed yesterday a motion to
16 exclude various exhibits from the government's opening. The
17 government, I gather, identified the exhibits they intended to
18 use. And I've only, you know, sort of looked at that within
19 the last hour or so, so I haven't studied it.

00:26 20 My impression, though, was most of it didn't present a
21 problem. I was concerned about the cumulative nature of
22 photographs. And it seems to me that multiple photographs of
23 similar themes is probably not necessary, again, having in mind
24 that this is an opening and not a closing.

25 MR. CHAKRAVARTY: Yeah. I don't want the

1 government -- the government overproduced, as it has in several
2 circumstances, and sent the defense a list of all of the
3 exhibits that it intended to make a reference to, not
4 necessarily that they were actually going to publish to the
5 jury. And, in fact, the number of exhibits, including, for
6 example, the attacks on the World Trade September on September
7 11th, the government's present intent is not to even display
8 one of those, but to put context into when the defendant was
9 standing at Ground Zero there was, you know, some desire to put
00:27 10 one -- I think you'll find that the government's intended
11 photographs, maybe a handful, won't cover -- certainly won't
12 implicate the cumulative aspect of it, but they are all
13 exhibits that we intend to introduce and we think we have a
14 good-faith basis of introducing them.

15 THE COURT: Okay.

16 MS. BASSIL: I don't know what that means.

17 THE COURT: It means he's not going to use very many.

18 MS. BASSIL: We object to even one, your Honor, of the
19 World Trade Center. We object to --

00:28 20 THE COURT: No. No. I think the objection was
21 relevance -- or 403, anyway. I think it's admissible. I do
22 think cumulativeness is the problem. And, you know, if there's
23 a choice among several, there might be an avoidance of undue
24 prejudice as you choose which of the several is the right one.

25 MS. BASSIL: I'm a little unclear, because there also

1 were some highly inflammatory and far more prejudicial and
2 probative photographs of wounded U.S. soldiers, of coffins --

3 THE COURT: That was another area, the funeral photos
4 and so on.

5 MR. CHAKRAVARTY: The government does not intend to
6 use it in the opening. I guess that -- but for your Honor's
7 benefit, when this issue comes up again, as I'm sure it will,
8 in an e-mail that the defendant sent to himself and then to
9 other people, he sent this e-mail with these photographs of
00:29 10 wounded soldiers.

11 THE COURT: All right. Okay. We'll see how the
12 evidence develops.

13 MS. BASSIL: Your Honor, by the same token, I'm
14 unclear if they're going to submit 12 photographs of
15 Osama bin Laden and Zarqawi.

16 MR. CHAKRAVARTY: No.

17 MS. BASSIL: How many?

18 MR. CHAKRAVARTY: Zero.

19 MS. BASSIL: All right.

00:29 20 And, your Honor, finally -- and I don't know if you
21 want me to go through this -- but they have two summary charts,
22 one of which is inaccurate, and I don't think summary charts
23 should be used in an opening, and the other is a reference to
24 the online identities the defendant used. And it's -- I mean,
25 it looks like one of those charts they use in organized crime

1 cases. We don't object to a list what we may have used on
2 one -- you know, AOL, and what he might have used on another --

3 THE COURT: Those look like chalks to me rather than
4 exhibits, right?

5 MR. CHAKRAVARTY: That's right, your Honor.

6 MS. BASSIL: And I object to them at this point.

7 THE COURT: Maybe the way to handle it is to let me
8 see them in the morning -- or this afternoon if you have
9 them -- and I'll assess them.

00:30 10 MS. BASSIL: May I say, your Honor, they have a chalk
11 of people he spoke to in instant messages and they only list 18
12 people and I counted over 29. And so it's a misleading chalk
13 and it's not even accurate.

14 THE COURT: Well, is it 29 names for 18 people or
15 something?

16 MS. BASSIL: No. No. I was very careful not to
17 double-count names. There are 29 different individuals; they
18 only refer to 18 in their diagram.

19 MR. CHAKRAVARTY: Again, the defense presumes to
00:30 20 suggest what that chalk would be indicative of. In 1006, your
21 Honor, the witness who will be talking about that chalk will
22 talk about the actual items that are in evidence. Not all of
23 the chats that may exist on the defendant's hard drive but,
24 rather, those relative chats that the government is introducing
25 as the defendant's statements. That is that universe of 18

1 chalks.

2 But with regards to the other issues in terms of what
3 chalks are going to be shown, I will have those chalks -- I'll
4 have them on foam board probably later today and I'll bring
5 them down, and if the defense has any objections to anything
6 that the government intends to show...

7 There is one clarification I wanted to make. There
8 was one video clip that the government intends to play. It's
9 about a minute and 15 seconds long. It was the "Expedition of
00:31 10 Umar Hadeed" video that the defendant translated. And a
11 portion of that includes a short speech by Osama bin Laden that
12 was subtitled. That we do intend to play. We expect it to
13 come in. We don't expect it to be particularly inflammatory.
14 But we've given the timestamps to the defense.

15 THE COURT: Is it the government's position that the
16 subtitling was the defendant's?

17 MR. CHAKRAVARTY: On that video, yes. I can't
18 say -- now, the video -- for theology sake, there was an Arabic
19 version of the video that had been produced. I don't know
00:32 20 what -- I guess we have that as well. But then the defendant
21 further edited that, further put subtitling on it, and it's in
22 English. So, I mean, that's the inference.

23 THE COURT: Okay. Other matters?

24 MS. BASSIL: Well, your Honor, again, there are
25 photographs of, you know, insurgent fighters, I assume.

1 They're masked; they're carrying RPG's, rocket-propelled
2 grenade launchers; they're carrying bazookas. Again, I would
3 like to know if they're going to use these. I think they're
4 far more prejudicial than probative.

5 THE COURT: Let me ask: Perhaps -- you've indicated,
6 Mr. Chakravarty, that you intend to use a significantly smaller
7 set of exhibits than were identified.

8 MR. CHAKRAVARTY: Right. They will actually be
9 published to the jury, your Honor. I think there will be a
00:32 10 handful.

11 THE COURT: Right. Can you have them available in
12 advance of the opening so that defense counsel has the
13 specifics?

14 MS. BASSIL: All we need are the numbers. If he could
15 just send me the numbers I can look them up. By e-mail, that's
16 fine.

17 MR. CHAKRAVARTY: I can do that, your Honor.

18 THE COURT: And then if a controversy remains, I can
19 look at them and decide.

00:33 20 MR. CHAKRAVARTY: As long as we're talking about
21 photos, before we leave the topic -- and maybe this is a
22 transitional electronic, but counsel has -- last night sent
23 over the few photos that they intended to publish to the jury
24 in their opening. One is a copy of the Constitution; one is a
25 copy of some photos that were involved in *Snyder*, a First

1 Amendment case that the Supreme Court recently decided; and
2 some, I think seven, are a set of the defendant's Christmas
3 photos, amongst other photos.

4 The government obviously objects to all of these, but
5 it raises the issue of the First Amendment, the defense
6 intention to -- further corroborated by this -- to ask the jury
7 to define the parameters of the First Amendment as opposed to
8 your Honor or a three-judge panel or the Supreme Court. I
9 mean, this is not Dewey Square and Occupy Boston; this is a
00:34 10 courtroom where there are certain facts that the jury has to
11 find. And the government wants to make sure that that's what
12 this trial stays about.

13 THE COURT: Right. Go ahead.

14 MR. CARNEY: This case is squarely focused on who this
15 man is. And as every trial lawyer does, I want to humanize him
16 by talking about his upbringing. The photographs I use will
17 just show different periods of his life leading up to the point
18 where the relevant conduct begins in this case. And I think
19 that it's appropriate and permissible for me to show the jury a
00:34 20 photo when I'm describing my client at a particular point in
21 his life.

22 THE COURT: That's the Santa Claus photo?

23 MR. CARNEY: Yes. And --

24 THE COURT: I'm not as worried about that as the
25 Constitution and the *Snyder* demonstrators.

1 MR. CARNEY: I'm prepared to address that.

2 When I read the government's trial memo -- I forget
3 how many dozens of pages it was -- it was notable to me that
4 the government never once mentioned the case of *Holder versus*
5 *Humanitarian Law Project*. That is the seminal case that
6 interprets the lead indictment here, about providing material
7 support to a terrorist organization.

8 The input of that case is that certain conduct is
9 illegal if that conduct is done at the direction of al Qa'ida,
00:35 10 in our case, directly coordinated with a specific act of
11 al Qa'ida, or as a service to al Qa'ida that al Qa'ida has
12 sought and compensated the person for. *Holder* makes it clear
13 that there has to be that direct connection between the
14 defendant and the terrorist organization for *Holder* -- for the
15 statute 2339 to apply.

16 And what the court goes on and on is separate
17 independent advocacy. And the court said in order for this
18 statute to be constitutional, a defendant has to be allowed to
19 engage in independent advocacy because that is the heart of the
00:36 20 First Amendment. The court went on to say that it's possible
21 for a defendant to be a member of al Qa'ida and not break the
22 law. He can be a member of al Qa'ida and share the same goals
23 and beliefs that they have. He, himself, can speak publicly in
24 support of the goals and beliefs of the terrorist organization.
25 He can do all this because it's protected by the First

1 Amendment.

2 The government wants to introduce hundreds of videos
3 and e-mails and instant messages. Some of them undoubtedly are
4 going to be shocking; some may even be horrifying to the
5 jurors. Some may outrage them. And unless your Honor from the
6 very outset of this trial explains to the jury that possession
7 of those videos, possession of those books, independently
8 advocating these points of view are things that are fully
9 protected by the First Amendment -- unless the Court in a
00:37 10 preliminary instruction -- and I submitted one this morning. I
11 don't know if your Honor has seen it.

12 THE COURT: I haven't seen it.

13 MR. CARNEY: All right. And I wasn't expecting to ask
14 for action on it today. It's very short. It's a preliminary
15 instruction on the First Amendment and the fact that
16 independent advocacy is permitted. I used a jury instruction
17 from Judge Saylor's case in the so-called *Care* case on First
18 Amendment and how that applies to this statute. I also quoted
19 directly from *Snyder*, a 2011 case, where the U.S. Supreme Court
00:38 20 specifically talked about things that people can say or do that
21 are horrifying, they're hurtful, the majority of the people
22 strongly, strongly object to it, but the court, in an
23 eight-to-one decision, said the First Amendment allows people
24 to say that.

25 And what I wanted to do was use a single photo from

1 that case that shows people standing opposite a church during a
2 funeral for a soldier killed in Iraq, and the sign says things
3 like "Thank God for IEDs," "I'm glad your son is dead,"
4 horrifying things that the U.S. Supreme Court said are
5 protected by the First Amendment.

6 Laypeople, regular jurors, do not understand these
7 principles of law in the dry language of either the
8 Constitution or simply quotations from cases. A single photo
9 will speak 10,000 words and show the jurors what our Supreme
00:39 10 Court says is protected freedom of speech. And if they can see
11 just that -- I'm not introducing it or would not be offering it
12 as an exhibit, but as a demonstrative aid. So if they can see
13 an example by this Supreme Court, this year, that this is
14 protected First Amendment speech, then it will just help them
15 to keep in context the parade of horrors that they will see
16 thereafter.

17 In regard to the Constitution, I'm not asking to
18 introduce it as an exhibit either, but just hold it up as a
19 demonstrative aid to just say, "Our Constitution was amended
00:40 20 with the First Amendment to provide for freedom of speech, and
21 that the evidence in this case will show that all of these
22 instances being presented by the government were instances of
23 the defendant exercising his freedom of speech."

24 THE COURT: Well, I don't think it's appropriate for
25 demonstratives to illustrate judicial instructions in the law,

1 so I think that the photos of the Constitution and the *Snyder*
2 demonstrators are not appropriate. The other photo of some
3 event in the defendant's life is perfectly all right.

4 MR. CHAKRAVARTY: Your Honor, the related question is:
5 Will the defendant be able to argue what he just argued to the
6 Court? It's one thing to argue the fact that this was not done
7 in coordination with --

8 THE COURT: No. The question that the jury will
9 ultimately decide is whether the criteria of the statute have
00:40 10 been proved by the government beyond a reasonable doubt.
11 That's the precise question the jury will answer. They will
12 not decide whether the First Amendment protects something.
13 They may be given some instructions about case law, including
14 *Holder*, as they determine the fact issue, but they won't be
15 deciding the parameters of the First Amendment.

16 MR. CARNEY: I'm going to --

17 THE COURT: They will be deciding how those principles
18 may be considered in the light of the charges that are made and
19 the facts that have been proved by the evidence.

00:41 20 MR. CARNEY: I would like to tell the jury that your
21 Honor will give them guidance on what is protected by the First
22 Amendment or not because there will be certain items of
23 evidence here that I'm going to be -- if I can just finish?

24 THE COURT: Go ahead.

25 MR. CARNEY: There are going to be certain exhibits

1 here where I'm going to ask your Honor to make a ruling of law
2 that that act by the defendant is protected by the First
3 Amendment and cannot be considered material support. Because
4 what the government wants is for your Honor to make a decision
5 if something's protected by the First Amendment or not. I join
6 with that. I don't want the jury to decide whether something's
7 protected. But if the evidence is before them, they need to
8 know if it's protected, and the only way they're going to know
9 is if the Court tells them that possession of these videos is
00:42 10 not a crime.

11 THE COURT: Well, the speech may be protected if it is
12 not material support as defined by the statute. If it is
13 material support as defined by the statute, it is not
14 protected. I think that's what the holding in *Holder* says. So
15 the question whether or not it's protected is one that turns on
16 the question whether it amounts to what the statute condemns or
17 not. And if it does amount to it, then it's not protected and
18 it can be punished, and if it is -- if it does not meet the
19 criterion of the statute, then the statute cannot forbid it.

00:43 20 And it's protected in two ways: One, it's not covered
21 by the statute. It falls outside it; and, second, the reason
22 it's not covered is because Congress probably was conscious
23 that it had to respect that boundary in light of the First
24 Amendment. So the statute is still the primary focus, and what
25 the evidence is in light of the statutory standard will

1 determine the other issue, it seems to me.

2 So I don't envision at this point -- I haven't heard
3 the evidence. I don't envision at this point any extended
4 address of the First Amendment specifically to the -- as a
5 proposition of law to the jury.

6 To the extent that talking about First Amendment
7 rights and free speech is a proxy for talking about the
8 defendant's intentions, it may be part of the factual scenario
9 that the jury considers.

00:44 10 MR. CARNEY: I'd ask your Honor to reconsider this.
11 This isn't a law school class that's able to cabin things so
12 easily. On the one hand, evidence could prove that the
13 defendant committed material support or provided material
14 support; on the other hand, if it is speech protected by the
15 First Amendment, he didn't. And it's just too dry to say he
16 either broke the statute or he didn't when the jurors are going
17 to be left with all these horrible statements and videos and
18 remarks that were made. And for them not to know that the
19 reason that a person can do that with impunity is because of
00:45 20 the First Amendment basically guts the defense here.

21 THE COURT: I don't think that's a proper reading of
22 the *Holder* case, to say that it can violate the standard of the
23 statute and still be protected by the First Amendment.

24 MR. CARNEY: No. No.

25 THE COURT: *Holder* decided otherwise.

1 MR. CARNEY: No. No, I don't contend that at all.
2 What I'm saying is that certain conduct which someone might
3 otherwise think is providing material support to al Qa'ida is,
4 in fact, not coming within the statute because it is protected
5 speech under the First Amendment.

6 THE COURT: Okay. All right. I have nothing further
7 to say on it.

8 MR. CHAKRAVARTY: Your Honor, if this is a preview --
9 and I don't mean to belabor this, but should there be some
00:46 10 skirting of that bound, it's certainly not the government's
11 custom to object during opening, but after an opening from
12 either party -- the government has no recourse if something
13 like that comes out. I guess I'm seeking guidance. Is an
14 appropriate curative instruction something we should prepare in
15 advance which --

16 THE COURT: Depending on circumstances it might be
17 something appropriate. I don't know.

18 Okay. Any other matters today?

19 MR. CARNEY: No, your Honor.

00:46 20 THE COURT: Okay. So we'll assemble first tomorrow to
21 finish the empanelment process and then we'll --

22 MR. CHAKRAVARTY: Your Honor, sorry. There is one
23 other relatively minor issue, but the issue of sequestration of
24 witnesses. It's particularly germane to tomorrow because the
25 defendant has noticed several of his family members as

1 witnesses. You know, the rules obviously should apply to both
2 sides. With a customary carveout the government would be
3 asking for the case agents in the case who --

4 THE COURT: Plural?

5 MR. CHAKRAVARTY: Excuse me?

6 THE COURT: Plural?

7 MR. CHAKRAVARTY: There are two. The government will
8 take what it can get. But it's not the present intention to
9 have either of them testify. The reason they would have to
00:47 10 testify, in the government's estimation, is as a
11 chain-of-custody-type intermediary, which the government
12 doesn't anticipate doing.

13 So that's where it takes -- it's not the typical case
14 agent who is actually instrumental and is a testifying witness
15 and will have the leverage of absorbing everything that is
16 happening and then testify. Here they will not.

17 So either way, the government is willing to pare that
18 down if that's the Court's preference. But the rule should go
19 to the other side as well. If the defense witnesses get a
00:47 20 preview of all the government witnesses and then testify, then
21 their testimony will be tainted.

22 MS. BASSIL: Your Honor, we don't have a problem with
23 sequestration, but we are looking for a carveout for -- and
24 we're not certain we'd put these people on -- as an abundance
25 of caution the defendant's parents and his brother. What they

1 would have to testify to would have very little to do with the
2 government's case-in-chief.

3 The other person we would like to be able to sit down
4 is our technical expert. And the reason for that is I believe
5 they are going to have cart people talk about things that,
6 quite frankly --

7 THE COURT: Spencer? Is that what --

8 MS. BASSIL: Yes. Quite frankly, we don't understand
9 this without him interpreting it for us. And it has to do with
00:48 10 cached documents, unallocated space --

11 MR. CHAKRAVARTY: I have no objection to an expert
12 being present if that's what the subject of their testimony is
13 going to be.

14 MS. BASSIL: Right. So we need his help on that.

15 It is unlikely that any of our other experts are going
16 to be available, but we would have no problem if Mr. Kohlmann
17 sat in on our experts and if our experts sat in with them. I
18 doubt they'll have the time, you know.

19 THE COURT: It's fairly customary. I think that
00:49 20 making an exception for the three family members you've
21 identified is not a problem.

22 MS. BASSIL: Thank you.

23 THE COURT: I don't think this is the kind of case
24 where a family member sitting through the litany is going to
25 have an opportunity to tailor testimony in the way they might

1 expect in some other kind of circumstance. So I think that's
2 harmless.

3 MS. BASSIL: And I think --

4 THE COURT: Then, of course, if there is some issue
5 that arises, it can be pointed out to the jury on
6 cross-examination.

7 MS. BASSIL: And potentially we may need the person
8 we've used for translation. We may need her to be here on a
9 couple of days.

00:49 10 MR. CHAKRAVARTY: That's fine, your Honor.

11 MS. BASSIL: So...

12 MR. CHAKRAVARTY: Your Honor, just in my notes of
13 things to raise, to clarify, is it okay, then, if the case
14 agents are allowed to stay in for the openings?

15 THE COURT: Yes, I think so.

16 MR. CHAKRAVARTY: The final subject of the
17 government's motions in limine which I don't think your Honor
18 has addressed that the government's concerned about is the use
19 of the defendant's statements that may not be admissible
00:49 20 because they're being offered by the defendant and the comments
21 that have been made throughout the case about the reasons for
22 the government's prosecution of the defendant, the alleged
23 reasons that it is some kind of vindictive or retaliatory
24 prosecution which, of course, it is not.

25 The concern is this may be an opportunity to advance

1 that theory without, again, much recourse, even though it's
2 inadmissible.

3 THE COURT: Who's making the opening? Mr. Carney,
4 you're making the opening?

5 MR. CARNEY: Yes. I think that is a solid basis in
6 admissible evidence to infer, that the defendant is being
7 punished because he would not become an informant. He was told
8 so much by an agent who was interviewing him. And if that's,
9 you know, the motivation, then that's properly something to be
00:50 10 considered.

11 THE COURT: You expect it in evidence?

12 MR. CARNEY: Yes, your Honor.

13 MR. CHAKRAVARTY: Your Honor, I would just raise under
14 *Armstrong* and its progeny, selective prosecution is an
15 illegal --

16 THE COURT: Actually, let me think about that. I'll
17 reserve that. The opinion of a single agent may not be fairly
18 attributed to the government's prosecution-charging decision.
19 It's not like -- it's not -- I'm not sure it's probative, I
00:51 20 guess is the thought. I'm not sure it's probative.

21 MR. CARNEY: I bet a jury would find it probative.

22 THE COURT: I don't know.

23 MR. CARNEY: And I know that the government says that,
24 of course, that's not why Mr. Mehanna is here. All the
25 cooperating witnesses who did far more the allegations of

1 Mr. Mehanna, they're walking in the back door; Mr. Mehanna, who
2 refused to become an informant, is walking in the side door.

3 THE COURT: Okay. I'll take a closer look at it. On
4 brief reflection, I'm not sure it's proper.

5 There was another issue?

6 MR. CHAKRAVARTY: That was it, your Honor.

7 Sorry. The defendant's own statements. Sorry. I
8 raised it --

9 THE COURT: Yeah. I guess they're hearsay if they're
00:52 10 offered for the truth; if there's a non-hearsay purpose, then
11 they could be used.

12 MR. CARNEY: That's how I view it.

13 THE COURT: Okay. We'll recess until tomorrow
14 morning.

15 THE CLERK: All rise for the Court. The Court is in
16 recess.

17 (The Court exits the courtroom and the proceedings
18 adjourned at 12:56 p.m.)
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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporters of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 09-10017-GAO-1, United States of America v. Tarek Mehanna.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSE, RMR, CRR
Official Court Reporter

Date: 10/26/11